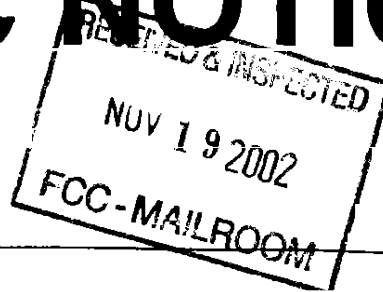




# PUBLIC NOTICE

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## DOMESTIC SECTION 214 APPLICATION FILED FOR TRANSFER OF CONTROL OF XO COMMUNICATIONS, INC., DEBTOR-IN-POSSESSION, AND ITS SUBSIDIARIES

### STREAMLINED PLEADING CYCLE ESTABLISHED

WC Docket No. 02-360

On October 22, 2002, XO Communications, Inc., Debtor-in-Possession ("XO" or the "Company"), on behalf of itself and its subsidiaries, along with High River Limited Partnership ("High River") (collectively, the "Parties") filed an application pursuant to section 63.04 of the Commission's rules,<sup>1</sup> for consent to the transfer of control of XO and its subsidiaries that hold blanket domestic section 214 authorization, to a newly reorganized XO Communications, Inc. (Reorganized XO)<sup>2</sup> pursuant to a plan of reorganization.<sup>3</sup> High River, a limited partnership ultimately controlled by Carl C. Icahn, will acquire majority control of Reorganized XO.<sup>3</sup>

Applicants assert that this transaction is entitled to presumptive streamlined treatment pursuant to section 63.03(b)(2)(i) of the Commission's rules because Reorganized XO will have a market share in the interstate, interexchange market of less than 10 percent, Reorganized XO will provide competitive telephone exchange services or exchange access services (if at all) exclusively in geographic areas served by a dominant local exchange carrier (LEC) that is not a party to the transaction, and neither XO nor Reorganized XO is dominant with respect to any service.<sup>4</sup>

<sup>1</sup> 47 C.F.R. § 63.04.

<sup>2</sup> XO filed a voluntary petition for reorganization in the U.S. Bankruptcy Court for the Southern District of New York on June 17, 2002. *See In re XU Communications, Inc.*, Case No. 02-12947 (AJG) (Bankr. S.D.N.Y.), filed June 17, 2002. Pursuant to Section 63.03(d)(2) of the Commission's Rules, XO notified the Commission of the *pro forma* transfer of control of entities operating pursuant to domestic section 214 authority from XO Communications, Inc. to XO Communications, Inc., Debtor-in-Possession by letter dated June 19, 2002.

<sup>3</sup> The applicants have also filed applications to assign or transfer control of XO's international section 214 authority, 91 LMDS licenses, ten 39 GHz licenses, and one Industrial/Business Pool, Conventional license, all of which will be processed separately. Any action on this domestic 214 application is without prejudice to Commission action on other related pending applications.

<sup>4</sup> *See* 47 C.F.R. § 63.03(b)(2)(i).

XO is a full-service provider of communication and information services to business customers throughout the U.S.<sup>5</sup> XO's product portfolio includes: suites of voice offerings that include inbound and outbound local and interexchange services, calling card services and conferencing; private data networking services; integrated voice and data services; Internet access services; and Web hosting services. XO delivers these services over its own network of metropolitan fiber rings and long haul fiber optic facilities, and through the use of facilities or services leased or purchased from incumbent LECs.<sup>6</sup> Since 1994, XO has deployed metropolitan fiber networks in more than 63 markets in the United States and abroad. XO is a Delaware corporation, as will be Reorganized XO.

High River is a Delaware limited partnership engaged in the business of buying, selling, investing, and holding securities and debt obligations. Carl C. Icahn, a U.S. citizen, ultimately controls and has a majority ownership interest in High River through his ultimate control and ownership of its general and limited partners. The general partner of High River is Barberry Corp. ("Barberry"), a Delaware corporation. Mr. Icahn owns 100 percent of Barberry's stock. Barberry holds approximately a 1 percent partnership interest in High River, which has two limited partners. One limited partner is Chelonian Corp. ("Chelonian"), a New York corporation. Mr. Icahn controls either directly or indirectly approximately 99 percent of Chelonian's stock. Chelonian holds approximately a 91 percent partnership interest in High River. The other limited partner in High River is Highcrest Investors Corp. ("Highcrest"), a Delaware corporation. Mr. Icahn controls either directly or indirectly approximately 99.5 percent of Highcrest's stock. Highcrest holds approximately an 8 percent partnership interest in High River.

Upon consummation of the proposed transfer of control, High River will hold no less than an 80 percent equity interest in Reorganized XO.<sup>7</sup> A separate rights offering may dilute High River's holdings of XO equity, but High River will continue to hold a majority of XO's shares and therefore will be in *dejure* and *defacro* control of Reorganized XO after the rights

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<sup>5</sup> XO has individual subsidiaries serving the District of Columbia and the following states: Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wisconsin.

<sup>6</sup> XO states that its network includes the following: more than 2,750 on-network buildings; access to an additional 63,000 buildings; fixed wireless licenses covering 95 percent of the top U.S. business markets; five data centers and a 24/7/365 network operations center; more than 350 DSL access points; over 70 public and private peering arrangements; nationwide OC-192 SONET and IP backbone; and more than 22,400 route miles of fiber. XO states that it currently offers dedicated Internet access in 36 metropolitan POPs in 31 markets. DSL in 44 markets. and its intercity and Metro Area Networks span over 1 million miles throughout 40 major U.S. cities, including the top 30. XO also provides resold international long distance services.

<sup>7</sup> No other shareholder is expected to hold 10 percent or more of the new initial common stock of Reorganized XO.

offering.’ The plan of reorganization will also result in Meadow Walk, a Delaware limited partnership ultimately controlled by Mr. Icahn, holding an approximate 1.4 percent equity interest in Reorganized XO. Shortly after High River and Meadow Walk acquire the stock of Reorganized XO, they may distribute such stock so that it will be held by Cardiff Holding LLC (“Cardiff”). Cardiff is a Delaware limited liability company which is ultimately controlled by Mr. Icahn.

The transfer of control would occur as a result of a restructuring of XO pursuant to a plan of reorganization – the “Stand-Alone Plan.” Under the Stand-Alone Plan, the outstanding shares of XO stock will be canceled, and \$500 million of the \$1 billion in existing loans under XO’s secured credit facility will be converted into 95 percent of the new initial common stock of Reorganized XO, with the remaining \$500 million converted into a \$500 million pay-in-kind junior secured loan. XO noteholders and general unsecured creditors collectively will receive the remaining five percent of this initial common equity. As noted, Reorganized XO may seek to obtain funding through a \$200 million rights offering. Any shortfall from the rights offering may be covered by up to \$200 million in new senior secured loans ranking senior to the new junior secured debt, although no agreements for this financing have been reached.

Applicants state that the reorganization of XO according to the Stand-Alone Plan is critical to XO’s survival. Applicants further assert that this application would likely result in public interest benefits, as it would allow a large competitive LEC to remain as a valuable competitor and provider of telecommunications services. According to Applicants, the reorganization of XO pursuant to the Stand-Alone Plan would place Reorganized XO on firm financial footing and would thereby preserve and strengthen competition in the telecommunications industry, to the ultimate benefit of the public.

Applicants also state that the procompetitive benefits of the Stand-Alone Plan would not be diminished by any anticompetitive effects. Applicants state that no competitors would be

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<sup>8</sup> Pursuant to the rights offering, certain of XO’s creditors, including Meadow Walk Limited Partnership (“Meadow Walk”), and certain holders of equity interests will have pro rata rights to acquire up to 40 million shares of stock of Reorganized XO, after which the unexercised rights will be available to the holders of senior debt, including High River. However, even if all of these shares were issued to other parties, High River’s equity interest in Reorganized XO would not be diluted below 50 percent.

<sup>9</sup> The Company’s initial reorganization plan was based on a Stock Purchase Agreement (“Purchase Agreement”), dated January 15, 2002, by and between affiliates of Forstmann Little & Co. (“Forstmann Little”) and an affiliate of Telefonos de Mexico, S.A. de C.V. (“Telmex”) whereby those entities would invest \$800 million in exchange for 80 percent of the reorganized company’s equity (“Forstmann Little/Telmex Plan”). Consummation of that transaction would have resulted in a transfer of control of XO from Craig O. McCaw and the existing shareholders of XO to the new shareholders of Reorganized XO, which would have included, as 10 percent or greater shareholders, Forstmann Little and Telmex. However, the Forstmann Little/Telmex Plan will not be implemented. XO and Forstmann Little have reached an agreement pursuant to which the Purchase Agreement will be settled. The termination of the Purchase Agreement is subject to Bankruptcy Court approval, for which application was made on October 15, 2002.

eliminated **as a** result of the transaction, and neither High River, **Mr. Icahn**, nor their affiliates control or hold **a** substantial interest in any other telecommunications carrier.

### **GENERAL INFORMATION**

The transfer of control application identified herein has been found, upon initial review, to be acceptable for filing **as** a streamlined application. The Commission reserves the right to return any transfer of control application if, upon further examination, it is determined to be defective and not in conformance with the Commission's rules and policies. Interested parties may file **comments within 14 days** and **reply comments within 21 days** of this notice."

Unless otherwise notified by the Commission, an applicant is permitted to transfer control of the domestic lines or authorization to operate on the **31<sup>st</sup>** day after the date of this notice."

Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24121 (1998).

Comments filed through the ECFS can be sent as an electronic file via the Internet to <<http://www.fcc.gov/e-file/ecfs.html>>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption **of** this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to [ecfs@fcc.gov](mailto:ecfs@fcc.gov), and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply.

Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appear in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Vistronix, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to

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<sup>10</sup> See 47 C.F.R. § 63.03(a)

<sup>11</sup> Such authorization is conditioned upon receipt of any other necessary approvals from the Commission in connection with the proposed transaction.

9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW, Washington, D.C. 20554. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

**In addition, one copy of each pleading must be sent to each of the following:**

- (1) the Commission's duplicating contractor, Qualex International, 445 12<sup>th</sup> Street, S.W., Room CY-B402, Washington, D.C. 20554; e-mail: [qualexint@aol.com](mailto:qualexint@aol.com); facsimile: (202) 863-2898; phone: (202) 863-2893.
- (2) Tracey Wilson, Competition Policy Division, Wireline Competition Bureau, 445 12<sup>th</sup> Street, S.W., Room 5-C437, Washington, D.C. 20554; e-mail: [twilson@fcc.gov](mailto:twilson@fcc.gov), and
- (3) William Dever, Competition Policy Division, Wireline Competition Bureau, 445 12<sup>th</sup> Street, S.W., **Room 5-C266**, Washington, D.C. 20554, e-mail: [wdever@fcc.gov](mailto:wdever@fcc.gov); and
- (4) Imani Ellis-Cheek, Telecommunications Division, International Bureau, 445 12<sup>th</sup> Street, S.W., Room 6-A739, Washington, D.C. 20554; email: [iellis@fcc.gov](mailto:iellis@fcc.gov); and
- (5) Zenji Nakazawa, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau, 445 12<sup>th</sup> Street, S.W., Room 4-C401, Washington, D.C. 20554; email: [znakazaw@fcc.gov](mailto:znakazaw@fcc.gov); and
- (6) Nandan Joshi, Office of General Counsel, 445 12<sup>th</sup> Street, S.W., Room 8-A820, Washington, D.C. 20554; e-mail: [nioshi@fcc.gov](mailto:nioshi@fcc.gov).

Filings and comments are also available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, **SW**, Room CY-A257, Washington, DC, 20554. They may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW. Room CY-B402, Washington, DC, 20554, telephone 202-863-2893, facsimile 202-863-2898, or via e-mail [qualexint@aol.com](mailto:qualexint@aol.com).

For further information, please contact Tracey Wilson, at (202) 418-1394 or William Dever, Competition Policy, Wireline Competition Bureau at (202) 418-1578.

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